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PROPER AND IMPROPER INTERACTIONS BETWEEN BENCH AND LAW SCHOOL: LAW STUDENT PRACTICE, LAW STUDENT CLERKSHIPS, AND RULES FOR ADMISSION TO THE FEDERAL BAR

JACK B. WEINSTEIN*

It is the thesis of this paper that judges should assist the law schools when the academic community calls for assistance. Judges should never seek to control the law schools directly or indirectly in the slightest degree by exercising their rulemaking power or by other means.

INTRODUCTION

The symbiotic relationship between bench and law school is intense in this country. Judges are partly molded for good or bad by their law school training 10 to 40 years before they become members of the bench. Law secretaries usually come fresh from the classroom bringing not only enthusiasm but the current learning and prejudices of the academic world to assist in the difficult task of reeducation of the persons for whom they clerk. The judges read the law reviews and profit from them; a bad review of an opinion may be more important than a reversal, for appellate judges are generally no wiser than their *nisi prius* brethren, but student-run law reviews contain articles and notes by those learned in the law who may influence future developments.

The bench itself is one of the major legal institutions studied in the classroom. Its opinions are, under the traditional case method, the staple of our casebooks. In connection with newer clinical methods, the courts provide a source of practical work. Academic studies of the administration of litigation use the courts and judges as major reserves of data.

Many judges participate in the moot court programs of the law schools. Some of them teach courses or participate actively in seminars and lecture programs.¹ And some, from time to time, even

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¹ See ABA CODE OF JUDICIAL CONDUCT, CANONS 4, 5; CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, CANONS 4, 5. For a summary of past nonjudicial activity of Supreme Court Justices see McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROB. 9, 27 (1970). Most of this instruction is at a professional school level, but there is a growing

make modest contributions of articles to the law reviews. As the commentary to canon 4 of the Code of Judicial Conduct of the American Bar Association (ABA) puts it, a judge "may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."²

These are activities of individual judges. Recently, however, the bench, as an organized entity charged with the administration of the courts, has attempted to become involved with what goes on in law schools. When institutional rather than individual interaction is involved, power is multiplied and so are the possible dangers and advantages. I shall address myself to two examples of what I consider proper involvement, federal court student practice and part-time clerkship rules, and one of improper involvement, proposed rules of admission to the federal bar. The law schools have with near unanimity opposed the latter.³

STUDENT PRACTICE RULES

For some years law schools have been developing clinical and other programs to train law students as litigators. The latest study by the Council on Legal Education for Professional Responsibility (CLEPR) indicates that 41 states now permit student practice.⁴ Authorization mechanisms vary. Legislation, judicial rules, or bar regulations are utilized. On the federal level, "[t]he United States District Courts for Connecticut, the Middle District of Louisiana, Kansas, the Northern District of Ohio, the Eastern District of Pennsylvania and the District of Columbia, the United States Bank-

trend towards general legal education at the college level and even earlier. Students attending trials in my courtroom as part of the regular curriculum range from the third grade to the third year of law school. See, e.g., Special Comm. on Youth Education for Citizenship, *Report*, 1975 A.B.A. REP. NO. 230; N.Y. Times, Mar. 28, 1976, § 1, at 27, col. 1.

² ABA CODE OF JUDICIAL CONDUCT, CANON 4A. It is, however, unethical for a judge to indulge his penchant for legal education to the point of making up hypothetical cases and publishing opinions on them in the official reports. See *In re Copland*, 66 Ohio App. 304, 33 N.E.2d 857 (1940), *appeal dismissed*, 137 Ohio St. 637, 32 N.E.2d 23 (1941).

³ See, e.g., Ehrlich, *A Critique of the Proposed New Admission Rule for the Federal District Courts in the Second Circuit*, 61 A.B.A.J. 1385 (1975); Statement of Dean Michael I. Sovern, Columbia University School of Law, The Association of the Bar of the City of New York Public Hearings, Nov. 20, 1974. The substance of Dean Sovern's statement appears in 67 F.R.D. 577 (1975). In unpublished statements the appropriate committees of the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Federal Bar Council have objected to the proposed rules of admission. See, e.g., Special Comm. on Professional Education and Admissions & Committee on Federal Courts of the Association of the Bar of the City of New York, *Joint Report on the Proposed Rule for Admission to Practice Before the United States District Courts in the Second Circuit*, 31 RECORD OF N.Y.C.B.A. 95 (1976).

⁴ COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS & COMMENTS 24 n.4 (2d ed. 1973) [hereinafter cited as CLEPR REPORT].

ruptcy Court of Nebraska, and the United States Courts of Appeals for the Third and Fourth Circuits" all have student practice rules.⁵ My own court, the United States District Court for the Eastern District of New York, and the Court of Appeals for the Second Circuit have just followed the trend by adopting student practice rules.⁶

The ABA adopted a Model Student Practice Rule (Model Rule) in 1969, which has spurred the growth of this practice.⁷ The Model Rule is somewhat restrictive, perhaps unnecessarily so. For example, it sanctions student representation of the state in criminal cases as well as the representation of indigent persons. In contrast with the narrow focus of the Model Rule, Arizona, California, North Dakota, South Dakota, Texas, and Wyoming permit representation of "any client."⁸ Aside from its questionable limits on student activity, the Model Rule provides welcome guidance on such issues as certification, extent of supervision, and client consent. In fact, the Judicial Conference of the United States "agreed to recommend that all federal courts consider the advisability of adopting a local rule similar to the American Bar Association model rule but tailored to the needs of the particular district or circuit."⁹ The common thrust of these rules is that the authorization for student practice should be broad enough to maximize the benefits of flexibility and experimentation in the law schools without sacrificing the key factor of judicial control of what happens in the courtroom. The student practice rule of the District Court for the Eastern District of New York, summarized below, combines features of rules adopted in a number of jurisdictions.¹⁰

While section 1 of the Eastern District rule allows for extensive representation by law students, it also establishes eligibility standards and requires court approval, lawyer supervision, and the written consent of the client.¹¹ The precise details of these safeguards comprise the subsequent sections of the rule. The power to terminate a law student's privileges to practice or to limit

⁵ *Id.* at 12.

⁶ E.D.N.Y.R. 4.1; 2D CIR. APP. P. SUPPL. R. 46(e).

⁷ CLEPR REPORT, *supra* note 4, at 3.

⁸ *Id.* at 7. See ARIZ. SUP. CT. R. 28(e); California Rules for Practical Training of Law Students, in CLEPR REPORT, *supra* note 4, at 53; N.D.R. APP. P. 46; S.D. COMPILED LAWS ANN. § 16-18-2.1 (Interim Supp. 1975); TEX. REV. CIV. STAT. art. 320a-1(3) (Cum. Supp. 1975); WYO. SUP. CT. B. ASS'N R. 18.

⁹ REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 80-81 (1971).

¹⁰ For an analysis and comparison of the various state student practice rules, see CLEPR REPORT, *supra* note 4.

¹¹ E.D.N.Y.R. 4.1.

the student's participation in a case at any time is fully reserved to the court.¹² Because some judges will not want to be burdened with evaluating law students, the rule states that a termination shall not reflect on the student's ability or character.¹³ The rule is intended to effect a new relationship between the law schools and the district court through the vehicle of clinical education, but it does not exclude students affiliated with attorneys in private practice. While no problems are anticipated concerning the limited practice allowed by the rule, for 41 states, including New York, have rules permitting student practice, section 6 makes clear that such practice is authorized by the district court and hence not deemed a violation of any state prohibition of practice without a license.

Evaluations of authorized student practice are sparse, but one attitudinal survey of judges before whose courts clinical students appeared did yield significant data.¹⁴ Almost all of the judges who replied thought that student practice fostered professional responsibility as well as knowledge of techniques. Judge Alvin Rubin of the United States District Court for the Eastern District of Louisiana summarized the answers as follows:

Since most of these programs are in an infant stage, and the supervisor teachers are all new to their roles, few having had more than a few years' prior experience, the number of favorable responses is remarkable. . . .

. . . [O]n the whole [the judges] found competent client representation, work quality about equal to the average delivered by the entire practicing bar. Only in the courtroom skills — cross-examination, oral argument, and direct-examination — do a significant portion of the judges consider students less able than the average lawyer.¹⁵

In summary, the court student practice rules show implicit respect for law students, their teachers, and the practicing bar, but enable the court to retain complete control of the way the rule will function in the courtroom. They are sound examples of cooperation between the bench and law schools.

LAW STUDENT PART-TIME CLERKSHIP PROGRAM¹⁶

For some years a number of federal and state judges have been using student law clerks in cooperation with law schools. The

¹² *Id.* R. 3(c).

¹³ *Id.*

¹⁴ See Rubin, *The View from the Bench*, in CLINICAL EDUCATION FOR THE LAW STUDENT 251 (CLEPR 1973) (working papers prepared for CLEPR National Conference, Buck Hill Falls, Pa., June 6-9, 1973).

¹⁵ *Id.* at 254 (footnote omitted).

¹⁶ The following section on part-time student clerkships is substantially adapted from an

benefits to both students and the courts have been substantial. Some of these former student law clerks have served as clerks to federal and other judges. Others have been welcomed by prestigious law firms as a result of their training. In many instances they have become members of the bar of one of our federal courts, thereby raising the average level of competence of lawyers before us.

The Judicial Conference of the United States, at its April 1973 session, was advised by its Advisory Committee on Judicial Activities that the practice of some judges of using law students (who receive academic credit) as part-time law clerks without pay was not in conflict with judicial canons.¹⁷ The Conference concluded, however, that while there was no impropriety in using such part-time clerks, the practice did raise a policy question because such programs created a new form of participation in the working of a court.¹⁸ The Conference, therefore, referred this question to its Committee on Court Administration (Committee).¹⁹

Later in 1973, the Committee created an Ad Hoc Subcommittee (Subcommittee) to study the matter. In 1974, the Division of Inter-Judicial Affairs of the Judicial Center was commissioned by the Subcommittee to conduct surveys among federal judges, law schools, and participating law students concerning the effectiveness of existing programs.²⁰ By January 1975, the Subcommittee had completed its evaluation. Two of the judges on the Subcommittee submitted a report to the Committee favorable to continuation of part-time clerkship programs, while one judge submitted a minority report opposing the program on the ground that part-time law clerks might jeopardize the confidentiality of a judge's office.

The Committee rejected its Subcommittee's majority report. In its report to the March 1975 session of the Judicial Conference, the Committee stated:

Your committee has expressed grave doubts as to the value of [part-time clerkship] programs but is particularly concerned with the confidentiality which is so essential to the work of law clerks. Without in any way condemning student intern programs as such, your committee recommends that the Judicial Conference express its disapproval of the use of students as part-time unpaid law clerks to federal judges.²¹

earlier discussion entitled Weinstein & Bonvillian, *A Part-Time Clerkship Program in Federal Courts for Law Students*, 68 F.R.D. 265 (1975).

¹⁷ See COMMITTEE ON COURT ADMINISTRATION, REPORT TO THE JUDICIAL CONFERENCE 23 (1975) [hereinafter cited as COMMITTEE REPORT].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See 1974 FEDERAL JUDICIAL CENTER ANN. REP. 23.

²¹ COMMITTEE REPORT, *supra* note 17, at 23.

At its March meeting the Judicial Conference referred the matter back to the Committee for further study. Because the Judicial Conference was aware that these programs were continuing, its remand to the Committee for further study cannot be viewed in any way as suggesting that the programs be discontinued pending the study.

As a result of its study, the Division of Inter-Judicial Affairs of the Federal Judicial Center found part-time clerkship programs effective as an aid to the courts and the law schools. The following summaries were compiled by the Judicial Center. Thirty judges were identified as using law student researchers, and of these 30, 22, or 68 percent, responded to a Judicial Center questionnaire. Of the 22, all generally recommended the program as worthwhile. In most cases the students supplemented the work of the regular law clerk, though some judges preferred to have the students work on special projects, such as research on the federal rules of evidence and preparation of a digest on all class action cases for a circuit court.

Twenty judges exercised some degree of direct supervision over the law students. Most delegated much of the supervision to their regular law clerks. One judge left most of the supervision to a part-time magistrate. Fourteen of the 22 judges responding had used the program for at least 1 year at the time of the survey. Five had used the program for 2 to 4 years, and three had used the program for 5 or more years, including one judge who had participated in such a program for 14 years.

Several judges thought the program should place the student for at least 1 year. All the judges thought the experience beneficial to the students, especially when the judges were able to work closely with them. The overwhelming majority of judges, 90 percent, found the students' work helpful to the court. Five judges found the program assisted them in training and screening future law clerks. Most of the participating judges worked with one or two law students per semester.

My own experience with eight students from two law schools confirms these findings. Their work made a major contribution to the court. They functioned as law clerks, except that their workload was much lighter; they observed trials and conferences and were assigned memoranda and research papers. Their written work was revised and criticized by me.

Of the 157 law schools sent questionnaires by the Judicial Center, 104 replied. Of those replying, 73 have no programs utiliz-

ing law students as researchers for federal judges. Of the 73, 42 have programs with nonfederal judges; 25 expressed an interest in a federal program; and 4 planned to start a federal program. Of the 31 law schools that do have a federal program, 12 desired to expand this work, and 16 also included nonfederal judges.

The Judicial Center was only able to locate 27 students who had been part-time clerks, and responses were obtained from 8 of them. All of these students regarded their participation as a valuable educational experience, and all felt that they had made a positive contribution to court operations. They provided data that suggested that they worked an average of 20 hours a week for 1 semester and received an average of four points of credit. While the students were supervised primarily by a regular law clerk, the judge participated to a lesser extent. And, as a general matter, duties of the student clerks paralleled those of the regular clerks.

A study by Columbia Law School evaluating its own part-time clerkship activities confirms the Judicial Center's findings.²² It found that where students were assigned "bench memos, drafts of opinion, memos for incorporation into opinions and similar work," especially when "these assignments were coupled with some feedback from the judge," the experience was "first rate."²³ Many responses emphasized that student clerks ought to be exposed to as much courtroom observation as possible, particularly when they are familiar with the matter being heard.²⁴ The report concluded that "this program is enormously useful to our participating students."²⁵

The use of part-time clerks does not violate federal statutes preventing the hiring of employees without congressional authorization.²⁶ This, of course, has been the uniform and consistent interpretation of all branches of our government. The availability of persons offering gratuitous service is one of the great strengths of our American system. To cite just a few examples: The President recently sought advice from the leading economists of the country on how to deal with vexing economic problems; congressional committees request the appearance of specialists in all kinds of subjects they deal with; and law professors and others submit memoranda and proposed bills to committees and individual con-

²² See generally H. Rabb, Review of the Operation of Columbia's Student Federal Clerkship Program, May 1974.

²³ *Id.* at 3.

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ For an analysis of potential federal statutory problems, see Weinstein & Bonvillian, *A Part-Time Clerkship Program in Federal Courts for Law Students*, 68 F.R.D. 265, 269-73 (1975).

gressmen. The various advisory committees appointed by the Chief Justice of the United States spend years drafting and revising such rules as the new Federal Rules of Evidence; and the Chief Judge of the Second Circuit has appointed a committee to investigate, hold hearings, and report on methods of improving the trial bar. Typically this work is unpaid. For many years government prosecutors, including those in the Eastern and Southern Districts of New York, have operated extensive programs utilizing unpaid law students as part-time assistants to attorneys in their offices.

As already noted, the Advisory Committee on Judicial Activities has declared that the use of law students as part-time law clerks is not in conflict with the Code of Judicial Conduct.²⁷ Nevertheless, two sections of canon 3 of the Code suggest policy problems concerning the status of part-time law clerks. In fact, one policy consideration is the issue of confidentiality that motivated the Committee on Court Administration to disapprove of the programs. These sections are designed, first, to prevent judges from consulting with noncourt personnel without the knowledge of counsel and, second, to block comment on pending proceedings by the judge or other court personnel. Neither presents any problem in a properly organized student clerkship program.

The relevant portions of the canon and its commentary read as follows:

CANON 3
*A Judge Should Perform
the Duties of His Office Impartially
and Diligently*

. . . .

A. ADJUDICATIVE RESPONSIBILITIES.

. . . .

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the

²⁷ See COMMITTEE REPORT, *supra* note 17.

proceedings, except to the limited extent permitted. *It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.*

. . . .

(6) *A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. . . .*

Commentary: "Court personnel" does not include the lawyers in a proceeding before a judge.²⁸

As the quoted portion indicates, the commentary to canon 3A(4) limits a judge's communications concerning cases, but makes an exception for communications "with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities."²⁹ A full-time salaried law clerk is clearly within this exception; a part-time law clerk without salary performing tasks similar to a law clerk's would fall within this exception as well. But the status of part-time law clerks has not been formalized beyond the arrangements made between individual judges, law schools, and law students in the program.

A court rule allowing specific programs approved by the faculties of law schools will avoid any possible criticisms. Such a rule should provide that law students serving as part-time clerks or researchers for judges are deemed "court personnel" within the scope of canon 3A(4) and canon 3A(6). The student's name on an appropriate form of oath against revealing or discussing information obtained in the course of work should be required to be on file in the clerk's office and available to litigants and counsel. While a part-time law clerk is doubtless aware, from instructions of the judge or supervising law clerk, from law school, or from his or her own knowledge, of the importance of judicial confidentiality, it would be wise, for the protection of both the judge and the part-time clerk, to make this understanding formal. Judges should file a form of limited appointment showing the term and any conditions they wish to impose.

A further provision should permit attorneys to object to part-time law clerks' working on a case if it raises serious problems of confidentiality. A judge could then instruct the staff that the part-time clerk would have no access to information about that case. Once the rule is publicized, attorneys in pending cases should be

²⁸ ABA CODE OF JUDICIAL CONDUCT, CANON 3A(4), (6) & Commentary (emphasis added).

²⁹ *Id.* at 3A(4) Commentary.

deemed to have notice that a part-time clerkship program is operating in the district. A judge, of course, would retain the ability to limit the responsibilities and activities of a part-time clerk whenever a high degree of security is necessary. This could be accomplished by such means as instructions to staff, shifting the part-time clerk's workspace from chambers to a library or witness room, altering the part-time clerk's work assignments, or terminating a part-time clerk's duties during the pendency of an action, motion, or hearing.

It should be noted that in the United States Attorneys' offices in the Eastern and Southern Districts of New York, as well as in offices in other districts, extensive use of student interns is made. Despite the potential for far more serious confidentiality problems in prosecutors' offices than in judges' offices, prosecutors have worked out such problems with no apparent difficulties.

As in the case of the recently adopted student practice rule of the Eastern District of New York, the student law clerks should be required to certify familiarity with the Code of Professional Responsibility. They should, in addition, certify that they have read and are familiar with the Code of Judicial Conduct for United States judges, which, as noted, contains provisions relevant to their responsibilities.

In summary, the part-time clerkship program raises minor practical problems that can be readily resolved. The law schools and students are free to participate or not; no judicial pressure to engage in the program should be tolerated. While it supplies useful research assistance to judges, this is basically a teaching program. Judges provide law students with an otherwise unobtainable understanding of courts and the way litigation is carried out. In view of the suggestion in canon 4 that judges help improve the legal system and reports that the quality of litigation needs improvement, participation by judges seems entirely proper and should be encouraged. It should have a measurable effect in training a corps of dedicated, competent, and ethical litigators.

PROPOSED RULES REQUIRING LAW SCHOOL COURSES
OR THEIR EQUIVALENT FOR ADMISSION TO THE
FEDERAL BAR³⁰

Rules of admission being proposed for the district courts in the Second Circuit make it more difficult to be admitted to practice in

³⁰ The following discussion is substantially adapted from an earlier article entitled Weinstein, *Questionable Proposals to Make Admission to the Federal Bar More Difficult* (pts. 1-3), *ALI-ABA CLE Rev.*, Dec. 5, 12, 19, 1975, at 2, col. 1.

the federal courts by requiring a number of law courses or their practical equivalent and by requiring, for the first time, screening of applicants by admission committees.³¹ These prerequisites are substantially greater than those now required by other federal courts, including the Supreme Court of the United States. Their adoption would, I believe, be a mistake. They represent an unsound meddling in law school curricula and are in sharp contrast to the voluntary nature of the student practice and part-time clerkship rules just discussed.

In addition to committee clearances, the rules would require the applicants to certify their background in, and knowledge of, federal practice and statutes. The following academic and practical requirements are also sought to be imposed:

(6) That the applicant either has successfully completed a course of study in an educational institution, before or after admission to the Bar, covering the following subject matters or has met the standards or requirements prescribed and deemed equivalent by the Committee on Admissions in the following subject matters:

- (a) Evidence;
- (b) Civil Procedure, Including Federal Jurisdiction, Practice and Procedure;
- (c) Criminal Law and Procedure;
- (d) Professional Responsibility; and
- (e) Trial Advocacy.

(7) That the applicant has assisted in the preparation and has attended the hearing of four (4) proceedings, either criminal or civil, in which testimony was taken on the merits of a disputed issue. Two (2) of said proceedings must have been in a Federal Court. The name of the court, date, place, duration and title of each of said proceedings shall be set forth.

(8) That in lieu of the requirement of subparagraph (7), *supra*, the applicant may submit an affidavit that he has observed six (6) complete hearings in which testimony is taken on the merits of one or more disputed issues, including three (3) hearings in a

³¹ On June 19, 1975 the Judicial Council of the Second Circuit recommended that district courts in the Second Circuit adopt the rules proposed by the Advisory Committee on Qualifications to Practice Before the United States Courts in the Second Circuit, which appear in ADVISORY COMM. ON PROPOSED RULES FOR ADMISSION TO PRACTICE IN THE SECOND CIRCUIT, FINAL REPORT, in 67 F.R.D. 161 (1975) [hereinafter cited as FINAL REPORT]. Resolution Adopted by the Second Circuit Judicial Council on June 19, 1975, 67 F.R.D. 191 (1975).

The Council at the same time adopted without public notice more stringent admission standards for the Court of Appeals for the Second Circuit. This new rule may be in conflict with rules 46(a) and 47 of the Federal Rules of Appellate Procedure.

A resolution for further study, proposed by Chief Judge Irving R. Kaufman, was adopted by the Judicial Conference of the United States at its September 26, 1975 meeting. Presumably, the resolution applies to both trial and appellate court proposals. *See also* Polsby, *In Praise of Alexander M. Bickel*, 61 COMMENTARY 50 (1976). While Professor Bickel successfully argued the Pentagon Papers Case, he would not be qualified for admission to the Court of Appeals for the Second Circuit since he had previously tried only one case.

United States District Court, averring that he was present throughout the hearing, specifying the name of the court, the title and nature of the proceeding and the date and length of hearing.³²

Fortunately, the Judicial Conference of the United States, at its September 26, 1975 meeting, approved a resolution calling for further examination of the Second Circuit proposals. At the very least, this should avoid a balkanization of the federal courts that would make it even more difficult than today to train for, and to maintain, a national practice. More important, it should slow down a misguided rush into restrictions on the litigating bar. My own court and the District Court for the Southern District of New York have rejected the proposals pending this study.

As an alternative to this proposal, I suggest admission to the federal bar of anyone admitted to the state bar. To implement such a standard, cooperation among state as well as federal judges, the law schools, and others would be required to improve state admission standards and disciplinary procedures. Admission to any federal court should suffice for all federal courts. Further cooperation to improve undergraduate and postgraduate training in litigation is desirable; dictation by the courts is not. In the course of considering how more qualified lawyers can improve trials, it will undoubtedly be necessary to address ourselves to what can be done to improve our performance as judges.

The Second Circuit proposals are based, in my opinion, on a number of doubtful premises. These assumptions are:

1. The quality of representation in the federal courts is poor.
2. Deficiencies that exist are caused by lack of formal instruction and lack of experience.
3. Law schools need to be induced to give more training in litigation-related courses.
4. Federal practice and trials in the federal courts require more skill than state trials.
5. The federal courts should restrict those who appear before them to the elite.
6. Perhaps most important, the federal courts are an island unto themselves instead of a minor unit in a state-oriented structure designed to administer justice.

The last point seems to me of the greatest importance because it

³² FINAL REPORT, *supra* note 31, 67 F.R.D. at 188.

represents a break with an American tradition that goes back to the Federal Judiciary Act of 1789.³³ Admission and discipline of lawyers has always been considered a state function. Only the states have provided the machinery for controlling these matters effectively. Moreover, most of us have been dubious about government involvement in university curricula because of the first amendment overtones. Before the federal courts take a radical step and duplicate state and law school procedures, the need should be overwhelming.

Quality of Representation

First, it is assumed that the quality of representation in our federal trial courts is poor. This is contrary to my observations. I have found the quality of lawyering in my court to be generally high. The attorneys are serious and concerned about their clients. In moving cases promptly to settlement or to a resolution on the merits, counsel are usually aware of the applicable procedural rules and substantive law, discovery is used sensibly to develop the facts, and the time of the court and other attorneys is not wasted. Were this not so, the calendars in our district would have broken down long ago.

It is significant that the drafters of the Second Circuit proposals were advised by a law professor who is a skilled researcher in judicial administration to conduct a study asking judges to keep records of which lawyers they found inadequate and why. The backgrounds of these lawyers could then be compared with those of other lawyers in litigation to see what, if any, differences in law school training correlated with ineffectiveness. The proposers of the rule rejected the suggestion and proceeded without adequate factual research.

Experience and Training

Second, it is assumed that deficiencies in the trial bar are caused by lack of experience or by improper academic legal training. This has not been my experience. I find little correlation between years at the bar and incompetence in litigation. Some of the best cases that have been tried before me have been tried by neophytes. Some of the poorest representation has been by lawyers who have appeared in hundreds of trials. I am not suggesting, of course, that experience is useless; a good trial attorney tends to get better with age.

³³ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

To a large extent the problems of the trial attorneys who do not function as effectively as the bench wishes — and there are some few of them — are due to character and temperament rather than to defects in law school training or experience. Economic pressures, poor habits learned in the past in trial courts, and emotional difficulties are at the root of many of the problems. The younger members of the bar are generally well trained, particularly in federal practice. They are devoted to the administration of justice, and, within the sensible limits of economic possibility, they devote a great deal of time to their cases.

Assistant United States Attorneys are generally entitled to practice without being admitted under local rule.³⁴ A rule which makes it so much more difficult for private, as opposed to government, attorneys to appear in court raises at least a glimmer of an equal protection argument.

Often, the high quality of representation is not adequately compensated. For example, I believe that the burden on young, struggling practitioners is enormous. In 1970, Congress provided for a maximum fee of \$1000 in criminal cases, except in unusual circumstances, with a maximum of \$30 an hour being paid for in-court work and \$20 an hour for out-of-court work.³⁵ Out of this sum, stenographers, whose cost, including overhead, may run over \$10 per hour, must be paid. Since 1970, the consumer price index has increased 29.3 percent, yet allowable fees do not reflect this change. An increase is needed, particularly in habeas cases where the limit is set at \$250.³⁶

We do not, in the federal courts, wish to be put in the position of state courts. There, fees are sometimes so low³⁷ that lawyers are pressed to cut corners and dispose of criminal litigation without a trial, even when a trial is called for. Fortunately, we have been assisted by an excellent Legal Aid group, many OEO-funded offices, and volunteers from the bar doing pro bono work. They have, in effect, granted a subsidy to the courts and to the poor.

Critical to the effective delivery of legal services is a direct approach to the problem of payment for representation of the

³⁴ 28 U.S.C. § 515 (1970).

³⁵ 18 *id.* § 3006A(d)(1), (2). "Guidelines" of the Second Circuit have reduced the statutory fees. Such arbitrary conduct of courts is of doubtful legality, but no bar association has seen fit to take protective action.

³⁶ *Id.* § 3006A(d)(2).

³⁷ See, e.g., N.Y. COUNTY LAW § 722-b (McKinney Supp. 1975) (\$15 per hour for in-court work; \$10 per hour for out-of-court work; \$500 maximum in noncapital felonies; exception for "extraordinary cases").

poor and middle class.³⁸ The ABA and our own state and local bar associations are addressing themselves to this important matter. Unless we make it economically possible to represent clients properly, the level of representation will deteriorate.

Law School Training

Third, it is suggested that the law schools and postgraduate groups, such as the American Law Institute, are somehow not adequately preparing people for practice.³⁹ The proposed rules seek to rectify this alleged defect by placing strong indirect pressure on the law schools, through admission requirements, to increase litigation-related courses. Yet, in the history of American legal education we have never had such a uniformly fine group of law students so well trained for practice.

Part of society's problem is that we have had such an influx of able people into the law schools that some of the other professions are being denuded of talent. There may shortly be more than 30,000 law school graduates each year in this country.⁴⁰ Those taking the Law School Aptitude Test (LSAT) for admission may exceed 150,000 a year.⁴¹ Yet, the Bureau of Labor Statistics indicates that there will be traditional jobs for only 20,000 new lawyers each year.⁴² This dreadful competition for admission to law school has meant that every good law school is turning away people who just a few years ago would have been deemed qualified for the best institutions. These bright, energetic, and devoted persons will raise the quality of representation at the trial level enormously if they are given an opportunity to serve.

Many law schools have almost completely revised their methods of teaching procedure and practice. Clinical programs have burgeoned.⁴³ Federal practice is taught in the first year in almost every law school. In fact, I believe there may be too much emphasis on federal practice. One of the reasons that many young lawyers bring cases in the federal courts is that they feel more comfortable with federal than with state practice. The basic

³⁸ Weinstein, *Delivery of Legal Services Reviewed*, 171 N.Y.L.J. 85, May 2, 1974, at 1, col. 5. See also Gasperini, *Prepaid Legal Services: The Long View*, 61 A.B.A.J. 1348 (1975).

³⁹ See FINAL REPORT, *supra* note 31, 67 F.R.D. at 167-70, 187-88.

⁴⁰ See Section of Legal Education and Admission to the Bar, *Report*, 1975 A.B.A. REP. No. 126, at 5-6.

⁴¹ See Task Force on Professional Utilization, *Report*, 97 A.B.A. REP. 818 (1972).

⁴² Ginther, *Law School Graduates Face Tight Job Market*, OCCUPATIONAL OUTLOOK Q., Fall 1975, at 2-3. See also Slowitsky, *Occupational Outlook Handbook in Brief*, OCCUPATIONAL OUTLOOK Q., Summer 1974, at 19.

⁴³ See, e.g., CLEPR NEWSLETTER, Aug. 1974, at 1.

casebooks are designed to be used nationally, and federal practice is easier to use for teaching in a national school.

Insofar as the schools are concerned, the costs of new clinical programs have been great. They create very substantial pedagogic problems. Bar associations and the bench ought to be concerned with getting more fiscal aid to the law schools so that these courses can be expanded, particularly since students seem to want them. But there is a grave danger in emphasizing them too greatly at the expense of other areas of the curriculum which are also pressing to expand. No forced feeding as a result of implied or explicit compulsion from bar admission standards is required. Students want these courses, and the law schools are responding sensibly.

There is, too, the problem of overlapping and inconsistent curriculum regulations. The ABA wants to require certain courses on ethics; the New York Court of Appeals has certain requirements;⁴⁴ and Indiana has detailed standards some have characterized as the *reductio ad absurdum* of curriculum control.⁴⁵ For the federal courts to add standards that have the effect of requiring still additional undergraduate law training could well produce inconsistent and confusing directives. At this time, the law schools are doing a better job than ever, working more closely than before with the courts and the bar, and multiplying their uses of intern and visitation techniques. As the former chairman of a curriculum committee, I can only recommend that the federal judicial voice be withheld except as the voice of encouragement and as the provider of intern opportunities.

The New York Court of Appeals and some other state courts, insofar as they have sought to regulate the law schools through admission requirements, may have adversely affected law school curricula. For example, clinical work is limited, but work in special substantive fields is not.⁴⁶ Federal judges should lead by extending training opportunities rather than by regulating curricula indirectly.

Federal Practice Requirements

Fourth, it is assumed that the federal practice and the trial of the cases in the federal courts require an expertise over and above that required in the state courts. This is, I believe, incorrect. The pleadings and other practices are simpler in the federal courts than

⁴⁴ 22 N.Y.C.R.R. 520.4 (1968).

⁴⁵ See IND. SUP. CT. (ADM'N & DISCIPL.) R. 13.

⁴⁶ See 22 N.Y.C.R.R. 520.4(c)(5) (1968).

in most state courts. Any lawyer who can try a case in the state courts can certainly do it in the federal courts.

Elitism

There is an assumption prevalent among some proponents of plans for strict federal admission standards that the judges and the practicing bar in the federal courts are somehow, or should be, the elite of the American legal system requiring special treatment. I deny that. The view of federal practitioners as special is based upon an assumption about the nature of litigation in the federal courts and its relation to judicial administration as a whole that, in my view, the times have overpassed.

I know that some of my illustrious brethren on the federal bench differ on this point, but as our daily practice indicates,⁴⁷ the federal courts have been given responsibility for many small cases which are of great importance to individual litigants. We handle social security cases of individuals who have been denied redress by the Department of Health, Education, and Welfare,⁴⁸ job discrimination matters,⁴⁹ prisoners' rights cases, housing and voting rights matters,⁵⁰ minor debtor-creditor disputes,⁵¹ and a variety of issues which concern people of limited means. Our small claims work is extensive and socially important, and this is as it should be. The Constitution and federal code are not some theoretical protection in the sky. They furnish practical safeguards for individuals, requiring courts to deal with gritty problems of everyday life.

I see no reason why, for example, a litigant who has a problem with the denial of a disability award under the social security law should have to go to some specialist from the federal bar to achieve redress. A local storefront lawyer is a necessary and perfectly capable resource.

While the federal courts are only a minor part of the total judicial structure, they provide vital services. I do not agree that consumer and other matters ought to be shifted out of the federal courts or that we ought to be restricted to what were formerly considered the important federal specialties — important in part because they involved large sums and interesting theory. Growing out of our acute sense of due process in a society in which in-

⁴⁷ See generally Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A.B.A.J. 938 (1974).

⁴⁸ See 42 U.S.C. § 405(g) (1970).

⁴⁹ See *id.* § 2000e-5(f) (Supp. IV, 1974).

⁵⁰ See *id.* § 1983 (1970).

⁵¹ See 11 *id.* § 35.

creased governmental intervention and regulation seems to have become irreversible, the humane specialties of today are not transferable out of the domain of federal law.

While this is surely not the intention, restricting admission to the federal bar will restrict entry of litigants into the federal courts. Lawyers admitted only to practice in the state courts will tend to overlook the possible federal remedy. Speaking in another context, the Supreme Court has warned us that "it is fundamental that access . . . to the courts for the purpose of presenting . . . complaints . . . not be denied or obstructed."⁵² Just a short while ago, that Court again pointed out that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."⁵³ The proposed Second Circuit rules would have precisely this effect.

Responsibility for Admission to the Bar

We should not forget that the federal courts were designed as supplementary to the states' systems of justice. There was a close question as to whether the execution of federal laws should not be left in the first instance with state courts, thereby avoiding the need for a federal trial court. As Charles Warren noted, "[i]t is a singular fact, not always recalled, that many ardent pro-Constitutionalists had already expressed the belief that the State Courts might well be entrusted with such power, subject to appeal to the Federal Supreme Court."⁵⁴

Even with the expansive development of federal laws and bureaucracy in the last 50 years, the federal court structure probably provides less than 1 percent of our total litigation service. Partly for this reason, control of the bar has always been almost exclusively in the hands of the states. The states have adopted a comprehensive system for dealing with admission and discipline. Where separate rules of admission for the federal courts exist, they are pro forma, relying on prior state admission. Judge Rosenn of the Court of Appeals for the Third Circuit recently pointed out:

Comity recognizes that the founding fathers created a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

⁵² *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

⁵³ *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

⁵⁴ Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65 (1923).

In the United States, admission to the bar and discipline of attorneys is peculiarly within the province of the states.⁵⁵

It is a mistake, I believe, for the federal courts to unnecessarily step into this field of admission to the bar as a separate force. Whatever is done should be accomplished primarily by the states and the law schools, with federal judges offering only assistance and encouragement.

Admission Procedures

It is undesirable to add screening committees to the already burdensome federal district court requirement of affidavits, sponsors, and court appearances. The court, the sponsor, prospective members of the committees, and the applicant can ill afford the time. Apart from the pleasure of meeting younger members of the bar, I find the admission procedure, requiring personal appearance before the court, an embarrassment and sense that I ought to apologize to the attorneys for requiring their attendance. The paperwork and court appearance add nothing; no one is ever rejected.

The present requirements of some district courts that applicants state that they are familiar with, for example, titles 18 and 28 of the United States Code are hard to defend. No judge or specialist practitioner would make such a claim. It is negligence almost as a matter of law to take a procedural step without rereading the applicable statutes and rules. There is nothing more dangerous to clients than assumed familiarity with rules and statutes.

Is it not an imposition on members of the bar to have to be admitted in each district and each circuit separately? The burden of superadded fees and applications may keep down competition by excluding members of the bar who cannot readily make the time for, and support the inconvenience of, seeking multiple admissions. We recognize this when we automatically grant *pro hac vice* applications in our court.⁵⁶

A Proposal for Open Admission

I strongly urge adoption of a rule that would make the only requirement for admission in the federal courts admission in a

⁵⁵ *In re Abrams*, 521 F.2d 1094, 1105 (3d Cir. 1975) (citation omitted) (Rosenn, J., concurring), quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971). See also *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 158 (3d Cir. 1975) ("There is no general grant of legislative authority to regulate the practice of law."), noted in 88 HARV. L. REV. 1911 (1975).

⁵⁶ Cf. *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir.) (en banc), cert. denied, 385 U.S. 987 (1966).

state court. In addition, I suggest that a single filing in one federal court suffice for all federal courts. Filing by mail of a copy of the certificate of admission to the state bar and a statement that there has been no disbarment or suspension should suffice. Our present requirements of district by district and court by court admissions have overtones of guildism. Like Pennsylvania's quondam county rule, they seem anachronistic. From a communications point of view, with telephones and speedy transportation available, the nation is no larger than my district was 100 years ago. One admission to the federal bar should suffice for all federal courts.⁵⁷

I would not, of course, oppose uniform state standards. We are making progress towards that end with some national uniformity in bar examinations.⁵⁸ Perhaps, however, it might be useful to consider adding some federal practice questions to state bar examinations to reflect the realities of present practice. For example, some questions on removal or jurisdiction might be appropriate. This kind of change would make the bar exams more congruent with what is in fact being taught in the law schools.

New Disciplinary and Training Programs

Notwithstanding the generally capable performance of trial attorneys, it is undeniable that there are cases where the performance of counsel is in some measure inadequate. But the remedy is not to superimpose another layer of requirements and procedures on top of a state's requirements. I submit that the occasional problem lawyer or case can and should be handled by the normal appellate processes and grievance procedures. No system of pre-screening or training should be allowed to divert our attention from the most important measure of the quality of representation, the level of individual performance in specific cases.

In many circuits, the trial and appellate check on the performance of counsel may be less effective than it should be because of adherence to the "farce and mockery" standard for reversal of a criminal conviction on the grounds of ineffective assistance of counsel.⁵⁹ Efforts in this area might be more direct and more just

⁵⁷ See B. Agata, Report to Federal Judicial Center on Admissions & Discipline of Attorneys in Federal District Courts 13, Aug. 1974 [hereinafter cited as Agata Report].

⁵⁸ Cf. *Symposium — A Standard Bar Examination*, 17 B. EXAMINER 8 (1947).

⁵⁹ See *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); cf. *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975), noted in 89 HARV. L. REV. 593 (1976). See also Address by David L. Bazelon, "The Realities of Gideon & Argersinger," National Legal Aid and Defender Association, Nov. 13, 1975.

to litigants aggrieved by inadequate counsel if consideration were given to a liberalization of the "farce and mockery" standard and a standard similar to that adopted by the Fifth and Sixth Circuits, *i.e.* whether counsel rendered "reasonably effective assistance," were embraced.⁶⁰

Reversal of a conviction on the grounds of ineffective assistance of counsel under any standard ought, in the absence of extraordinary circumstances, call into play an investigation by an appropriate body. Similarly, with respect to civil cases, adequacy of counsel should be closely scrutinized on appeal, and reversal of a lower court decision on that basis should suggest grievance or disciplinary proceedings. A procedure for trial courts bringing such inadequacies to the attention of the proper body might be appropriate.

The purpose of such a body might in part be disciplinary. It might, for example, report to the appropriate state disciplinary authority. Its main function, however, it seems to me, should be to help lawyers. In some cases, advice, training programs sponsored with the cooperation of law schools, or even psychiatric or other aid might be needed. Punishment by such means as disbarment or suspension should be a last resort.⁶¹

Federal courts possess no effective procedure for dealing with discipline problems. Rather than set up a whole new system, I would, consistent with my proposals for reliance on state admission machinery, prefer a cooperative venture with the state courts. Presently, the federal courts' power to discipline members of its own bar is theoretically independent of state court power over state bar members, but the practical relationship is close.⁶²

CONCLUSION

The law schools are engaged in studies and clinical and other work that will produce a better trial bar and profession. The role of the courts is to assist the law schools in their work, not to force change. In the area of legal education, as elsewhere, judicial humil-

⁶⁰ See *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). See also Note, *Effectiveness of Counsel in Indiana: An Examination of Appellate Standards*, 7 IND. L. REV. 674 (1974).

⁶¹ See Agata Report, *supra* note 57, at 39-47, relying on Special Comm. on Evaluation of Disciplinary Enforcement, *Report*, 95 A.B.A. REP. 783 (1970).

⁶² See, *e.g.*, *Theard v. United States*, 354 U.S. 278 (1957) (state disbarment not automatic cause for federal disbarment); *Selling v. Radford*, 243 U.S. 46 (1917) (must show good cause why Supreme Court should not follow state disbarment); *cf.* *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (limits on state control over state bar); *Sperry v. Florida*, 373 U.S. 379 (1963) (state could not prevent patent specialists not admitted to state bar from practicing in state).

ity is desirable. The law school and the bench each have a primary responsibility which should be respected.⁶³ Each should embrace the opportunity to assist the other.

⁶³ See Special Comm. on Professional Education and Admissions & Committee on Federal Courts of the Association of the Bar of the City of New York, *Joint Report on the Proposed Rule for Admission to Practice Before the United States District Courts in the Second Circuit*, 31 RECORD OF N.Y.C.B.A. 95 (1976). In this study, responsibility for improving the trial bar was outlined as follows:

Actions for Which Primary Responsibility

Would Rest with the Courts:

4. Formulate steps to be taken by a trial judge to protect a party who is represented by inadequate counsel.
5. Consider development of procedures for referring problem counsel to a monitoring agency established in cooperation with the organized bar for appropriate remedial training and recertification upon proof of actual incompetency.
6. Reexamine the procedures for assuring the effectiveness of appointed counsel.
7. Consider the need to reexamine the standard for reversal of criminal conviction for inadequacy of representation.
8. Where the court has appointed trial counsel for representation of a criminal defendant, consider the circumstances under which it would be appropriate to appoint new counsel for an appeal.
9. Consider the desirability of collaboration between state and federal judges concerning recommendations for possible modification of the state bar examination to include questions bearing on practice in the federal courts.
10. Consider developing means for engaging representatives of the organized bar, the law schools and the bar examiners in a continuing dialogue on the problem of incompetency.

Actions Which Are Primarily the Responsibility
of the Law Schools:

11. Develop recommendations with respect to the expanded use of training for advocacy both before and after graduation from law school.
12. Consider other means of increased participation in post graduate education of the bar.

Id. at 98-101. Cf. Address by Marvin E. Frankel to lawyers being admitted to the United States District Court for the Southern District of New York, Dec. 30, 1975, in ALI-ABA CLE REV., (pt. 1) Feb. 13, 1976, at 1, col. 3, (pt. 2) Feb. 20, 1976, at 2, col. 1.

Law students have, as a group, opposed the imposition of education and experience requirements for admission to practice in the federal courts. 175 N.Y.L.J. 61, Mar. 30, 1976, at 1, col. 3. In any future rulemaking in this area, there should be a student representative on the committee drafting proposals. See ABA Law Student Division, *Report on Qualifications to Practice*, Apr. 29, 1976, at 1, col. 4.